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Supreme Court of the United States

OCTOBER TERM, 1953

ADELE WEISS,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY MORSE,
Counsel for Petitioner.

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The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above entitled case on October 21, 1953.

Opinions Below

The opinion of the District Court (R. 4) was not reported. The Per Curiam opinion of the Court of Appeals (R. 40) was not reported when this petition was filed.

Jurisdiction

The judgment of the Court of Appeals was entered on October 21, 1953 (R. 40). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Statement and Questions Presented

This is an action pursuant to Rule 60(b)[1] (comp. R. 34) to vacate two prior judgments, and pursuant to Rule 18,

[1] Federal Rule 60(b), Relief from Civil Judgments; 61 Yale Law Journal 76, 78.

for the proceeds of two certificates of level premium term National Service Life Insurance.

The veteran herein is one of a class of veterans who, while in service, took out two certificates of level premium term National Service Life Insurance. The veteran died on August 27, 1948 (R. 27). The Government disclaimed liability stating that the certificates had lapsed on March 31, 1947.

When plaintiff brought the first action, on March 2, 1949, she proceeded under the mistake of fact that the policies had lapsed, and as the Rules of Civil Procedure do not prescribe any method of examination before trial to frame a complaint, plaintiff alleged, as the Court below stated in *Weiss* v. *U. S.*, 187 F. 2d, 610, 611: "* * * for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums * * * sufficient and effective for the purpose * * *".

Plaintiff's complaint was dismissed for failure to state a claim without prejudice to plaintiff "* * * showing a different application or availability of such portion of the Fund to the payment of unpaid premiums * * *" and a motion to compel the Government to sell or supply the plaintiff with all regulations was also denied (92 F. Supp. 322, 325; aff'd 187 F. 2d 610; cer. den. 342 U. S. 820; rehearing den. 342 U. S. 872; 2d rehearing den. 342 U. S. 915.

The Court below stated (187 F. 2d 610, 611):

> "* * * whether or not there was any improper denial to plaintiff of the governing literature of the case, we now have all the material presented to us and this particular side issue has obviously become moot."

On November 26, 1951, plaintiff brought a second action for relief based upon the grounds specified under Rule 60(b) and for the proceeds of these certificates, alleging that the certificates had never lapsed (R. 17). In her affidavit in opposition to a motion for summary judgment, plaintiff in-

corporated by reference the answers to requests for admissions and an interrogatory as "* * * facts essential to justify his opposition * * *" (Rule 56f; R. 17). The District Court granted the defendant's motion for summary judgment and thereafter denied the motion to direct the defendant to answer and a motion to strike out the defense of res judicata on the ground of mootness (R. 17). The Court below affirmed on the opinion of the District Court (103 F. Supp. 470, aff'd 199 F. 2d 454; cer. den. 344 U. S. 934; rehearing den. 345 U. S. 914).

The following article from the New York Times, November 25, 1951, p. 12, indicates that the Court below never had all the facts:

> "Washington, Nov. 24, 1951 U.P. * * * The Veteran's Administration never has announced the formula it uses for figuring individual payments * * *."

The interrogatory requested the aforesaid formula.

On March 19, 1953, plaintiff brought the present action for relief based upon the grounds specified under Rule 60(b); also for judgment directing the Government to disclose the aforesaid formula; and for the proceeds of the policies (Comp. R. 34).

The Government moved for summary judgment (R. 13). Plaintiff made a motion to direct defendant's deposition before trial (R. 9) and to strike out the defense of res judicata (R. 8). In her affidavit in opposition to the motion for summary judgment, plaintiff incorporated by reference the testimony of this deposition of the defendant as "* * * facts essential to justify his opposition * * *" (Rule 56f, R. 10, 16, 26). The District Court granted the defendant's motion for summary judgment and denied plaintiff's motions (R. 4, 5, 6). The Court below affirmed on the opinion of the District Court (R. 40).

The complaint alleges inter alia (R. 30):

(22) "* * * the veteran herein had on deposit to his credit in the * * * Fund, on March 31, 1947, an amount of premiums * * *, which was more than sufficient to prepay the defendant for the sum total of the * * * premiums from March 31, 1947 to a date beyond the veteran's death."

(24) Section 605(a) of the Act states in part:

"* * * all premiums paid * * * shall be deposited to * * * such fund, which * * * shall be available for the payment of liabilities * * *".

(25) That by reason of the aforesaid, the contract required a ratable distribution over all members of the Fund of a payment which became due to any one of them.

(28) "* * * the veteran herein did pay his contributive * * * share of the * * * liabilities that were charged against the Fund * * * until the death of the veteran" (R. 31).

(29) "* * * that Congress, in order that there should be a mutuality of risk while these members of the Fund were compelled to pay their contributive share of the liabilities that were charged against the Fund * * *, made provision * * * in order to avoid the taking of property without due process * * * that they have the benefit of * * * the Act as to * * * extended values.

(30) "* * *, the defendant became obligated by contract to give these veterans insurance equal to the face value of the policies while the money on deposit in the Fund remained in the status of premiums until dividends were declared.

(32) "The aforesaid veterans, having died before dividends were declared * * * the rights of the parties became fixed and vested.

(34) "* * * the defendant * * * applying the provision of Section 605(a) of the Act to compel the veteran herein to pay his contributive * * * share of the pay-

ents * * * that were charged against the Fund * * to a date beyond the death of the veteran it cognized that the policyholder had the power to epay it to the extent of the premiums in its possession (R. 32).

(35) "* * * the formula used to compute the special dividend which the Government refuses to disclose will conclusively establish that unless the provision as to * * * extended values is made applicable to the premiums on deposit to the credit of these veterans in the Fund, there will be the taking of property without due process."

The Questions Therefore Presented Are:

(1) Where the Government cannot produce any regulations as to the disposition of this reserve, and as Sec. 605(a) of the Act makes this reserve "* * * available for the payment of liabilities * * *" until it is withdrawn from the Fund and allocated to dividends with the result that this class of veterans were compelled to pay their contributive share of the liabilities that were charged against the Fund until the dates of their death, should the Act and regulations be so construed as to take property without due process when they can be construed in a constitutional manner by applying the provisions of the Act as to "extended values" to this reserve?

(2) Where an action is brought to vacate two judgments upon the grounds specified under Rule 60(b), may the defendant interpose these judgments under attack as a defense to res judicata?

Statutes Involved

Sec. 605(a) of the Act, 38 U. S. C. A., Sec. 805(a), provides:

> "There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator."

Sec. 602(f) of the Act, 38 U. S. C. A. 802(f)[1] states in part:

> "Provisions for cash, loan, paid up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator."

Specifications of Errors to Be Urged

1. In affirming the orders granting the motion for summary judgment and denying the motion to direct the defendant to appear for an examination before trial (R. 6, 7) after the defendant had been duly served with a notice (R. 10) and failed to appear (R. 10), when this testimony was incorporated in the affidavit in opposition by reference as "* * * facts essential to justify his opposition * * *" pursuant to Rule 56(f) (R. 10, 16, 26).

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[1] Appendix, pp. 12, 13.

2. In overlooking that the present complaint requests judgment directing the Government to disclose certain facts which will conclusively establish that unless the provision as to "extended values" is granted to these veterans until dividends were declared, there will be the taking of property without due process (R. 32, 34).

Reasons for Granting the Writ

The class of beneficiaries affected by this decision consists of widows, orphans, aged parents and dependent brothers and sisters of deceased veterans; therefore care should be taken not to sacrifice principle for policy.

This is an insurance contract, not a banking contract. The Government, having accepted the premiums for insurance equal to the face value of the policies, became obligated both by contract and pursuant to Sec. 605(a) of the Act to give these veterans such insurance while their premiums remained in the status of premiums until dividends were declared. These veterans, having died before dividends were declared and while their premiums were still in the status of premiums and still in the Fund, the rights of the parties became fixed and vested (*Jones* v. *Union Central Life Ins. Co.*, 265 App. Div. 388; aff'd 290 N. Y. 883; *American National Bank and Trust Co. of Chicago* v. *United States*, 7th Cir. 159 F. 2d 188, 192). This mutual obligation that the premiums while in the Fund until dividends were declared "* * * shall be available for the payment of liabilities under such insurance * * *" (Sec. 605(a)) became a vested property right protected by the Fifth Amendment (*Lynch* v. *U. S.*, 292 U. S. 571, 576). Congress therefore prescribed a method of protecting this property right by making provision in Sec. 602(f) of the Act as to "* * * extended values * * *"; in this way these veterans will be given insurance equal to the face value of the policies for any premiums they had on deposit in the

Fund from the date of default to the date dividends were declared.

The foregoing explains why Congress did not limit the applicability of this provision to any particular plans of insurance.

The formula used to compute the special dividend which the Government refuses to disclose will conclusively establish that these veterans paid their contributive share of the liabilities that were charged against the Fund until their death. Applying these facts disclosed by the aforesaid formula to the definition of insurance as "Risk distribution" (*Helvering* v. *LeGierse,* 312 U. S. 531, 539) and "Equality of Risk", these veterans were never required to pay a higher premium than their contributive share of the liabilities that were charged against the Fund until their death. Thus, if the mortality table used or the plan (converted policies) require higher premiums, the unearned premiums and the reserve are proportionately increased but the veteran is never liable for more than his contributive share.

The regulations sustained as a defense in the former action make no provision as to a disposition of this reserve.

As to the first regulation [1] the Court below stated (187 F. 2d 610, 611):

> "* * * Sec. 10.3416: 'If any premium be not paid when due, the * * * policy shall cease and become void, except as otherwise provided in the policy.'"

It is not now disputed that upon the default of this veteran's premium payment on March 31, 1947, this veteran had on deposit to his credit in the Fund a reserve based upon unearned premiums which was sufficient to pay the

[1] Appendix, p. 15.

gross flexible premiums to the date of his death. Therefore to "void" this reserve would be in violation of the Fifth Amendment, as the obligation of the contract was to give these veterans insurance equal to the face value of the policy for these premiums until dividends were declared. That is why the regulation provided " * * * except as otherwise provided in the policy."

These certificates were issued in lieu of the policy and provided that the regulations and the Act shall constitute the contract. *Lynch* v. *U. S.*, 571, 577.

As the Government cannot produce any regulations as to what should be done with this reserve on the date of default, and as the Government could not " * * * cease and become void * * * "[1] this reserve in the policy, in view of the Fifth Amendment, it was therefore necessary to look to the Act as to the disposition of this reserve. As this reserve was part of the Fund until dividends were declared, it was " * * * available for the payment of liabilities under such insurance * * * " (Sec. 605a). These veterans were therefore compelled to pay their contributive share of the liabilities that were charged against the Fund until dividends were declared. Once dividends were declared, this reserve was withdrawn from the Fund and allocated to dividends, but until dividends were declared this mutual obligation continued. Had dividends been declared before the death of these veterans, they would not have been compelled to pay their contributive share of the liabilities that were charged against the Fund until their death. The Government by its very act in applying the provision of Sec. 605(a) of the Act to this reserve to pay the veteran's contributive share of the liabilities that were charged against the Fund until dividends were declared, " * * * recognized that the policyholder had the power to prepay it to the extent of the premiums in its possession" (Comp. par. 34; R. 32).

[1] Regulation Sec. 10.3416 (187 F. 2d 610, 611). Appendix, p. 15.

The foregoing indicates that the risk to pay for the liabilities that were charged against the Fund until dividends were declared is now placed upon those veterans who had premiums on deposit to their credit in the Fund without any risk on the part of the Government. The only way that there can be a mutuality of risk, and for the Administrator to avoid the taking of property without due process, would be to grant the provision of Sec. 602(f) of the Act as to "• • • extended values • • •" to these veterans.

The other three regulations sustained as a defense in the first action are inapplicable to the present facts as plaintiff does not predicate her claim on dividends, and these regulations require that dividends shall be paid in cash.

The Court below stated (187 F. 2d 610, 612):

> "• • • A regulation promulgated in the Spring of 1949, 38 C. F. R., 1949 Ed., Sec. 8.26(a) provided: Any special National Service Life Insurance dividend that may be declared shall be paid in cash only • • •."[1]

The Court below then referred to two other regulations, 38 C. F. R. 1949 Ed. Sec. 8.26 (R. 24).[2] and 38 C. F. R. 1947 Supp. 10.3426 (R. 25).[3] These two regulations provided "• • • will be used in addition to the reserve in the policy for the purpose of computing the period of extended term insurance • • •." As the author of these regulations used the words "reserve" and "dividends" in the same paragraph he intended each to have a different meaning.

Public Law 36 of the 2nd Congress, effective January 1, 1952 (R. 25)[4] erased the aforesaid regulations which pro-

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[1] On March 2, 1949, Plaintiff brought the first action. This regulation appeared in the Federal Register on May 28, 1949 (14 F. R 2832). Appendix, p. 15.

[2] Appendix, p. 14.

[3] Appendix, p. 15

[4] Appendix, p. 13.

vided that dividends shall be paid in cash without the written consent of the policyholder.

The Court below stated (*Weiss* v. *U. S.* 103 F. Supp. 470, 473; affirmed on the opinion below 199 F. 2d 454):

> "What is important and necessary for the plaintiff to support her claim, as indicated by the Court of Appeals, is to show some statute, or regulatory basis within the framework of the statute, for the right to look to some insurance reserve to remedy the failure to pay required premiums; how or why a reserve was allowed to accumulate by the Government is not material here."

The Government stated at page 9 of his brief in the Supreme Court (1st action): "* * * His policies, therefore, had no reserve which could then have been used to buy extended term insurance * * *."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

APPENDIX

Sec. 602(f) (38 U. S. C. A. 803(f))

Act of Oct. 8, 1940, as amended by sec. 3, Public Law 589, 79th Cong. Aug. 1, 1946, by sec. 2, Public Law 5, 80th Cong., Feb. 21, 1947, and by Public Law 838, 80th Cong., June 29, 1948.

(f) Such insurance may be issued on the following plans: Five-year level premium term,[16] ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled. All level premium term policies, except as provided below, shall cease and terminate at the expiration of the term period: *Provided,* That at the expiration of the term period any national service life insurance policy which was issued on a five-year level premium term plan before January 1, 1948, and which has not been exchanged or converted to a permanent plan of insurance, may be renewed as level premium term insurance for an additional period of five years at the premium rate for the then attained age without medical examination, provided, the required premiums are tendered prior to the expiration of the first term period: *Provided further,* That in any case in which the insured is shown by evidence satisfactory to the Administrator to be totally disabled at the expiration of the level premium term period of his insurance

[16] The 5-year term policies issued prior to December 31, 1945, were extended for an additional period of 3 years. (See appendix, Public Law 118, 79th Cong.)

under conditions which would entitle him to continued insurance protection but for such expiration, such insurance, if subject to renewal under this provision, shall be automatically renewed for an additional period of five years at the premium rate for the then attained age, unless the insured has elected insurance on some other available plan. Provision for cash, loan, paid-up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

Public Law 36—82d Congress, Chapter 94—1st Session
H. R. 321

AN ACT

To provide that on and after January 1, 1952, dividends on national service life insurance shall be applied in payment of premiums unless the insured has requested payment of dividends in cash.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 602(f) of the National Service Life Insurance Act of 1940, as amended, is hereby amended by substituting a colon for the period at the end thereof and adding the following: *"Provided further,* That until and unless the Veterans' Administration has received from the insured a request in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952."

Approved May 18, 1951.

38 C. F. R. 8.26 F. R. Sept. 16, 1948, p. 5399, Vol. 13, No. 181

Sec. 8.26 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' affairs. Any such dividend shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid up insurance as provided in Sections 8.29(a) and 8.30 respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash to the person currently entitled to receive payments under the policy.

38 C. F. R. (1947 Supp.) 10.3426 F. R. April 1, 1947, page 2129, Vol. 12, No. 64

Sec. 10.3426 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds.

(Secs. 601-618, 54 Stat. 1008-1014; 38 U. S. C. 801-818.)

38 C. F. R. (1949) Sec. 8.16 LAPSE FOR NON-PAYMENT OF PREMIUM. If any premium be not paid when due, the National Service Life Insurance policy shall cease and become void, except as otherwise provided in the policy.

38 C. F. R. (1949 Supp.) Sec. 8.26(a) SPECIAL DIVIDENDS. Any special National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.